

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICARDO MARTINEZ,

Plaintiff,

v.

A. ZEPP, et al.,

Defendants.

Case No. 1:20-cv-00646-JLT (PC)

**FINDINGS AND RECOMMENDATIONS
TO DENY PLAINTIFF'S MOTION TO
PROCEED *IN FORMA PAUPERIS* AND
DISMISS ACTION**

(Doc. 9)

14-DAY DEADLINE

Clerk of the Court to Assign a District Judge

Before the Court is Plaintiff's application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (Doc. 9.) Because Plaintiff has three "strikes" under section 1915(g) and fails to show that he is in imminent danger of serious physical injury, the Court recommends that his application be denied and this action dismissed.

I. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915

28 U.S.C. § 1915 governs *in forma pauperis* proceedings. The statute provides, "[i]n no event shall a prisoner bring a civil action ... under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

II. DISCUSSION

The Court takes judicial notice of four of Plaintiff's prior lawsuits that were dismissed because they failed to state a claim on which relief can be granted:¹ (1) *Martinez v. Davey, et al.*, No. 1:16-cv-00084-LJO-BAM (E.D. Cal.) (dismissed on October 30, 2017 for failure to state a claim, failure to obey a court order, and failure to prosecute); (2) *Martinez v. Davey*, No. 1:16-cv-01655-AWI-BAM (E.D. Cal.) (dismissed on March 5, 2018 for failure to state a claim); (3) *Martinez v. Lewis, et al.*, No. 1:19-cv-00812-DAD-SAB (E.D. Cal.) (dismissed on December 16, 2019 for failure to state a claim); and, (4) *Martinez v. Pfeiffer, et al.*, No. 1:19-cv-01684-DAD-SAB (E.D. Cal.) (dismissed on March 30, 2020 for failure to state a claim). All of these cases were dismissed before Plaintiff initiated the current action on May 4, 2020. Therefore, plaintiff is precluded from proceeding *in forma pauperis* in this action unless, at the time he filed his complaint, he was under imminent danger of serious physical injury. *See Andrews v. Cervantes*, 493 F.3d 1047, 1052-53 (9th Cir. 2007).

Plaintiff's claims in his complaint stem from an incident that occurred on March 28, 2019. (*See* Doc. 1 at 3, 6, 8, 10, 14, 22.) Plaintiff alleges that a doctor at Kern Valley State Prison "did a[n] intentional forceful act, on patient's left shoulder," even though the doctor knew of "Plaintiff's tumors, lesions, and 'tremendous pain,' being present at the left side of the spinal cord.... As a result of the conduct[] Plaintiff's tumors increased a[s] did his pain." (Doc. 1 at 6.) Plaintiff's allegations do not show that he is in imminent danger of serious physical injury.

III. CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, the Court RECOMMENDS that:

1. Plaintiff's motion to proceed *in forma pauperis* (Doc. 9) be DENIED; and,
2. This action be DISMISSED without prejudice to refiling upon prepayment of the filing fee.

The Clerk of the Court is DIRECTED to assign a district judge to this action.

These Findings and Recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**

¹ The Court may take judicial notice of court records. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 of the date of service of these Findings and Recommendations, Plaintiff may file written
2 objections with the Court. The document should be captioned, "Objections to Magistrate Judge's
3 Findings and Recommendations." Plaintiff's failure to file objections within the specified time
4 may result in waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
5 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

6
7 IT IS SO ORDERED.

8 Dated: May 15, 2020

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE